United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

CORRECTED BRIEF

75-4266

United States Court of Appeals
FOR THE SECOND CIRCUIT

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and NEW YORK SHIPPING ASSOCIATION, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

B P/S

BRIEF OF PETITIONER INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

THOMAS W. GLEASON, Esq.
Attorney for Petitioner International Longshoremen's Association, AFL-CIO
17 Battery Place
New York, New York 10004
(212) 425-3240

Of Counsel:
THOMAS W. GLEASON
HERZL S. EISENSTADT

249 Press of Fremont Payne, Inc., 417 Canal St., N. [illegible]

1

TABLE OF CONTENTS

TABLE OF CASES

A. SUPREME COURT

B. COURTS OF APPEALS

PAGE

C. U. S. District Courts

D. National Labor Relations Board

TABLE OF CASES

A. SUPREME COURT

B. COURTS OF APPEALS

PAGE

TABLE OF CASES

A. SUPREME COURT

B. COURTS OF APPEALS

PAGE

C. U. S. District Courts

D. National Labor Relations Board

STATUTES

MISCELLANEOUS

United States Court of Appeals
FOR THE SECOND CIRCUIT

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO
and NEW YORK SHIPPING ASSOCIATION, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF PETITIONER INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Statement of Issues

1. Whether applicable law requires the Board to consider cargo-handling preparatory work performed by deep-sea longshore labor at the piers and docks of New York as the "precise work" in controversy, rather than the work performed by employees of the Intervenor off-pier consolidators?

2. (a) Whether the Board's findings of violations of Section 8(e) and 8(b)(4)(D) of the Act, under the facts herein, as a matter of law, were contrary to the holdings and rationale of the Supreme Court in *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612

(1967) and *Houston Insulation Contractors Association* v. *N.L.R.B.*, 386 U.S. 664 (1967)?

(b) Whether the Board's failure to consider the work at issue as "fairly claimable," as work historically performed in pursuit of a lawful work-preservation objective, is contrary to the holdings and rationale of this Court in *Intercontinental Container Transport Corp.* v. *NYSA and ILA*, 426 F.2d 884 (2 Cir., 1970) and of the 8th Circuit in *American Boiler Manufacturers' Association* v. *N.L.R.B.*, 404 F.2d 547 (8 Cir., 1968), cert. denied, 398 U.S. 960 (1970)?

(c) Whether the Board arbitrarily deviated from its own precedents, consistent with the foregoing Decisions, and erroneously relied on clearly distinguishable authorities; (ILA (*U.S. Naval Supply Center*) 195 NLRB 273 (1972) and *ILWU* (*California Cartage Co.*), 208 NLRB 994 (1974))?

3. Whether ILA's activities and its contractual agreements with NYSA, designed to protect and preserve work of ILA longshoremen at piers and docks in the Port of New York, have primary objectives?

4. Whether the record, considered as a whole, and in the total perspective of labor relations in the Port of New York, shows, contrary to the Board's determination, that ILA, on behalf of the longshoremen it represented on the docks in the Port of New York, had not, in 1959, lost or abandoned its jurisdiction of the work of stripping and stuffing containers owned or leased by ILA employers originating in the prescribed area in the Port of New York and containing less-than-container-load cargo?; or

5. Whether the Board, in the context of the economic personality of the industry, erred in failing to find that the ILA, in the face of accelerating containerization and concomitant loss of jobs, after 1959, effectively took measures to recapture said work?

The Decision Below

By its Decision and Order, dated December 4, 1975, in *International Longshoremen's Association, AFL-CIO, and New York Shipping Association, Inc. (Consolidated Express, Inc. and Twin Express Inc.)*, 221 NLRB No. 144 (NLRB Cases Nos. 22-CC-541, 22-CC-554, 22-CE-19 and 22-CE-20) (186a)* the National Labor Relations Board expunged an integral component of the collective bargaining agreement between Petitioners, New York Shipping Association, Inc. (hereinafter "NYSA")** and International Longshoremen's Association, AFL-CIO (hereinafter "ILA")*** known as the Rules on Containers ("Rules")

---

* All references are to the Appendix. The record in this proceeding was stipulated by the parties in Joint Exhibit 1, dated April 4, 1974 (53a). It consists of the formal charges, pleadings, stipulations, procedural orders and supplemental affidavits before the Administrative Law Judge, as well as the pleadings, transcript and exhibits comprising the entire records in the Section 10(1) preliminary injunction proceedings in the United States District Court for the District of New Jersey before the Honorable Frederick B. Lacey, U.S.D.J. (Civil Cases Nos. 1155-73 (*Consolidated* Case) and 1811-73 (*Twin* Case)).

** NYSA is an incorporated, not-for-profit membership association of stevedores, steamship carriers and other employers of longshore labor in the Port. NYSA negotiates and administers collective bargaining agreements with the ILA on behalf of NYSA's employer-members (130a), including the only steamship carriers engaged in the Puerto Rican trade, namely, Sea-Land Service, Inc. ("Sea-Land"), Seatrain Lines, Inc. ("Seatrain"), and Transamerican Trailer Transport, Inc. ("TTT") (15a).

NYSA is one of the constituent members of Council of North Atlantic Shipping Associations ("CONASA"), an unincorporated membership association, whose members are the multi-employer bargaining associations in the six major ports on the North Atlantic coast, *i.e.*, Boston, Providence, New York, Philadelphia, Baltimore and Hampton Roads. Since 1971, CONASA has negotiated and administered key collectively bargained terms with ILA on a master coastwise basis, one of which is the Rules on Containers (15a-16a, 18a-22a, 131a).

*** ILA, an unincorporated labor organization, has for many years been the exclusive certified bargaining representative of the deepsea longshoremen and other crafts employed in all ports on the East and Gulf Coasts from Searsport, Maine, to Galveston, Texas. ILA has negotiated and entered into collective bargaining agreements with NYSA, and in 1971 with CONASA, covering the terms and conditions of employment of these employees in the North Atlantic ports including New York (131a).

(510a). In one fell swoop, 15 years of labor history and bargaining were buried.

The NLRB has found that the Rules violate Section 8(e) of the Labor Management Relations Act, 1947, as amended (29 U.S.C. § 158(e) (hereinafter "the Act") and that their enforcement by the Petitioners is a secondary boycott in violation of Section 8(b)(4)(i)(ii)(B) (29 U.S.C. § 158(b)(4)(i)(ii)(B)) of the Act. The Board's Decision is legally in gross error and is not supported by the record.

Preliminary Statement of the Case

Charges were filed by Consolidated Express, Inc., (hereinafter called "Conex") on June 1, 1973 in Cases Nos. 22-CC-541 and 22-CE-19. The General Counsel, by the Acting Regional Director for Region 22, on August 23, 1973, issued an Order Consolidating cases, Complaint and Notice of Hearing. The Complaint alleges Respondents ILA's and NYSA's violations of Section 8(e) and Respondent ILA's violations as well of Section 8(b)(4)(ii)(B), of the Act.

The Acting Regional Director filed a Petition for a Preliminary Injunction in the District Court for the District of New Jersey. An injunction issued following an extensive hearing on the merits before Judge Lacey.

On January 4, 1974, the Regional Director issued a second Complaint and Notice of Hearing upon similar charges alleging the same Respondents' violations of the identical sections of the Act, filed by Twin Express, Inc. (hereinafter called "Twin") in Cases Nos. 22-CC-554 and 22-CE-20. Another Petition was filed before the same District Judge, who heard the evidence and issued a second injunction on May 3, 1974.

All of the foregoing-enumerated cases were consolidated for hearing and determination before Honorable Arnold Ordman, an Administrative Law Judge of the Board and its former General Counsel.

On December 9, 1974, Judge Ordman issued his Decision (129a). He recommended that the Consolidated Complaints in the instant proceeding be dismissed in their entirety on the basis of his findings that the activities complained of by the Charging Parties were in furtherance of ILA's lawful pursuit of a valid work preservation objective within the contemplation of the Supreme Court's opinion in *National Woodwork*. Subsidiary—but crucial—to the Administrative Law Judge's findings was his determination that the ILA's demands to "recapture or reacquire the work in controversy to the extent it has been siphoned away" were "*directed to the members of the NYSA who are the employers of employees in the unit represented by the ILA, and not to the distant Charging Parties herein.*" Accordingly, he found the NYSA to consist of primary—rather than secondary—employers, so that the alleged activity was protected under the rationale of *National Woodwork and American Boiler*, and numerous other appellate decisions cited in the Judge's Opinion (168a-170a, 182a).

On December 4, 1975, the Board issued its Decision (186a). It failed to adopt Judge Ordman's recommendation, concluding that the on-pier stripping and stuffing work performed by longshoremen as an incident of loading and unloading ships does not embrace the work traditionally performed *by the Charging Parties* at *their* off-pier premises. On December 5, 1975, ILA and NYSA jointly petitioned this Court for review of the Board's Order. They urged that the Court reverse, vacate and set aside the Order. Thereafter, on January 3, 1976, the Court granted Petitioners' Motion of December 18, 1975 to Expedite Review. On January 12, 1976, the Board filed its Cross-Application for Enforcement of its Order herein with the Court.

The Facts

A. Prior to 1959

For many decades, employees represented by the ILA have performed all labor in connection with the loading and unloading of cargo at piers and waterfront terminals in the Port of Greater New York and vicinity, including related longshore activities, such as cargo repair and maintenance. Agreements covering this over-all *certified unit* have been negotiated between NYSA, on behalf of its member carriers, stevedores and other employers of longshore labor, and the ILA, on behalf of its members and affiliated locals.* (143a-144a)

The work jurisdiction of this portwide bargaining unit of longshoremen has traditionally included the preparation of cargo for ocean shipment by *making up* and *loading* of cargo on drafts, pallets, boxes and containers. In connection with the unloading of cargo, the unit work has involved the *breaking down* of drafts, pallets, boxes and containers of cargo, the *sorting* of cargo according to the consignees and types, and the *delivery* of such cargo to

---

* The certified unit is defined in *Matter of New York Shipping Association*, 116 NLRB 1183 (1966) as:

> "All longshore employees engaged in work pertaining to the rigging of ships, coaling of same, loading and unloading of cargoes, including mail, ships' stores and baggage, handling lines in connection with the docking and undocking of ships including hatch bosses, cargo repairmen, checkers, clerks and timekeepers and their assistants, including head receiving and delivery clerks; general maintenance, mechanical and miscellaneous workers; horse and cattle fitters, grain ceilers and marine carpenters, in the Port of Greater New York and vicinity . . . ." (116 NLRB at p. 1188)

Employees in the foregoing classifications are customarily designated "deepsea" longshoremen, an allusion to their location at dockside and engagement in work directly related to the loading and discharge of cargo aboard ocean-going vessels. Both Twin's and Consolidated's businesses primarily involve handling of shipments of containerized cargo between New York and Puerto Rico, which are carried aboard such vessels. The work of the employees in the various listed categories is interrelated to the point where employment of one group necessarily will result in correlative jobs for others within the certified unit.

trucks or other inland carriers for shipment to the consignees.

Thus, the undisputed testimony of Respondent Union's President Gleason, a veteran of 60 years on the waterfront in myriad capacities (1071a), as confirmed by that of NYSA's Administrative Director Haynes (982a-985a), shows that employees represented by the ILA have loaded (stuffed) and unloaded (stripped) containers* of progressively larger sizes *for at least 50 years* (1072a-1073a). These witnesses further stated—*without contradiction*—that it was the *custom and practice* in the industry even before the advent of open disputes over the issue of containerization and their formal, *in contractu* resolution, for deepsea longshoremen to stuff and strip containers, including those in the Puerto Rican trade. (See affidavits of C. Meyers and T.W. Gleason 85a-88a, 91a). Gleason also testified (1086a-1087a) that when the first fully containerized operator went into the Puerto Rican trade, it was understood and agreed that the customs and practices through the years were that all containers are loaded (stuffed) and discharged (stripped) at the piers, but that an exception was made for full container loads with the manufacturer's label (e.g., sent from an owner's job-site and containing the owner's products exclusively), and mail, military cargo and household goods.

Similarly, Messrs. Tattersall and Meyers state, *without contradiction,* that at the Pan Atlantic (now "Sea-Land") Terminal at Port Newark, where consolidation in its present context originated and developed, Valencia-Baxt (or: Hasman-Baxt), predecessor(s) to Consolidated, delivered cargo in break-bulk form to the terminal for consolidation prior to 1959 (1142a-1149a; affidavit of Charles Meyers, 85a-88a). Moreover, any pre-consolidated containers were delivered to shed #290 at that terminal, for re-handling by longshoremen, as observed by Mr. Meyers (Meyers affidavit, 86a).

---

* Sealable, box-like enclosures of varying sizes for shipment of large single, or numerous less-bulky, items.

B. 1959-1968

In 1958 ILA perceived the potential threat to longshore work implicit in containerization which was beginning to make inroads on the handling of cargo for sea shipment. Although the containers then in use were mostly of Dravo size (8 cubic feet), ILA protested that the amount of work performed by longshoremen on break-bulk cargo was decreasing.

Even prior to 1959, the ILA had claimed the work on consolidated LTL containers (890a, 894a-896a, 143a-144a). From the advent of containerization, NYSA also sought *concessions* from the ILA for the *unrestricted* use of containers. A compromise agreement between NYSA and ILA was made in their 1959 labor contract (208a-209a). All witnesses actually involved in those negotiations testified that the intent and understanding of the industry was that Section 8(c) of that 1959 agreement embodied the agreement whereby the ILA's right to stuff and strip consolidated LTL cargo was recognized. While the words of the 1959 agreement may not have been entirely precise, the uncontradicted testimony of every witness was that, regardless of the words, there existed stuffing and stripping regulations *in practice* at the docks from 1959. Every NYSA carrier witness testified that prior to the 1968 agreement, they recognized an obligation to the ILA that its members were entitled to stuff and strip cargo received at the pier from consolidators (896a, 911a-912a, 969a-970a, 993a-994a, 1050a-1051a, 1076a-1084a). Similarly, the ILA witnesses testified, without contradiction, that the ILA always insisted, and in practice had the right, to load and unload the cargo of all containers other than shippers' loads* (1069a-1070a, 1088a-1089a).

This jurisdiction was contractually recognized in the 1959 and all subsequent NYSA-ILA labor agreements. That there were disputes and controversies and claims

---

* Containers loaded by a manufacturer's employees at his premises and delivered intact to the ocean carrier or its stevedore.

with respect to whether or not these agreements were being honored in their entirety is not disputed by NYSA and ILA. Indeed, if those agreements had been faithfully lived up to, the present situation would not have arisen. However, NYSA and ILA were continually being told by NYSA carrier members that they were complying with the provisions of the Rules, and were shown (false) supporting shipping documents to that effect (410a, 411a).

Documentary evidence prior to 1968 (418a-435a), *proves* that there were *recurring disputes as to whether a particular container was a shipper's (or manufacturer's) load rather than an LTL consolidated container load.* If, as concluded by the Board, the latter, as well as the former, was not subject to any restrictions, there should have been no disputes. But the documentary material is to the contrary, as well as the following undisputed testimony:

(a) Michael R. McEvoy, Chairman of the Board and chief executive officer of Sea-Land, stated that since 1961, when he became president of Sea-Land, he knew that, under the provisions of the then existing collective bargaining agreement (1959 Agreement), Sea-Land was required to stuff and strip LTL and consolidated containers (1076a-1077a), and that it has been the fixed policy of Sea-Land, from 1961-1972, to have containers containing LTL and consolidated cargo stripped and stuffed by deepsea ILA labor at Sea-Land's terminal (1084a-1085a).

(b) NYSA executives Dickman and Haynes asserted that regardless of the terminology of the 1959 agreement, the industry recognized—and the practice on the piers since 1959 was—to stuff and strip consolidated containers (902a-903a, 993a-994a).

(c) ILA President Thomas W. Gleason, testified that in 1959 the union permitted the free movement of

shippers' loads *only* (Section 8(a), 208(a), subject to the royalty payments under the Stein Arbitration Award (329a). Section 8(c) specifically required the loading and unloading of all containers, *other than* shippers' loads, by ILA labor (1088a-1089a).

In addition to the foregoing, the record includes the presentation by NYSA *in 1962* of a clarification of the industry's interpretation of Section 8(c) of the 1959 labor contract, which, in its pertinent part, provided that:

> "Where an employer member of NYSA supplies a container *which is the property of such member,* to a consolidator for loading or discharging of cargo in the Port of Greater New York, it will be stipulated that such container must be loaded or unloaded by ILA labor at longshore rates.
>
> "If the container *is not supplied by the employer-member, then the royalty payments* fixed by the arbitrator *shall apply* depending on the type of ship used." (emphasis added) (284a, 850a-857a)

There can be no clearer demonstration of the bi-furcated treatment of containers emanating from different sources; nor as will later appear from the *ICTC* case, that *royalty* payments *did not* apply to containers *which were furnished by ILA deepsea longshore employers to consolidators* and that such payments applied *exclusively* to containers supplied to or emanating from other than consolidators (i.e., manufacturers).

Finally, there are the *numerous* arbitrations, grievances, work-stoppages and negotiations during the almost 10-year period from 1959 to 1968 relating to ILA complaints that consolidation of small loads was taking place off the piers, and carriers were permitting them to go on board without stripping and stuffing by the ILA at the piers, in violation of ILA's rights under the 1959 agreement with

NYSA (1093a-1095a, 385a,* 418(a), 418(a), 420(a), 423a, 424a, 428(a), 435(a)).

In 1967 the first fully containerized ship designed to carry large containers was introduced into the North Atlantic trade and there was mounting concern among the longshoremen as to the impact on their jobs. Accordingly, ILA formulated its demand that longshoremen stuff and strip *all* containers without exception. NYSA, in typical give and take of labor bargaining, *countered* with a demand that all existing restrictions on the movement of containers be eliminated. Bargaining negotiations, generally, foundered. A *57-day strike* ensued and a Presidential Board of Inquiry was appointed. Ultimately the differences between the parties were resolved and ILA and NYSA entered into their 1968 collective-bargaining agreement. The 1968 agreement was actually executed in February 1969 (146a-147a).

This Agreement contained detailed provisions on stuffing and stripping of L(ess) Than C(ontainer) L(oad) containerized cargo, which was a compendium of the practices of the parties to that time, and was entitled "Rules on Containers". The Preamble to the Rules specifically stated that their purpose was "to protect and preserve" longshore jurisdiction on piers and docks (511a-512a).

Subsequent to 1969, after the Rules were codified and received judicial approval in the *ICTC* case, the unchallenged documentary evidence is overwhelming that the ILA sought to enforce its contractual right to stuff and strip consolidated containers (438a, 453a, 460a, 472a-503a). In fact, the containers shipped by Twin and Conex were prominently mentioned in these documents as probable violations of the Rules (286a, 404a, 410a, 412a, and 416a).

---

* This grievance is referred to in the affidavit of Thomas W. Gleason, dated May 6, 1974. As set forth in that affidavit, the ILA took the position that its agreement with NYSA imposed obligations upon the NYSA member and it was against that member (Sea-Land) that relief was sought. The ILA did not seek relief from the consolidator, with whom it had no contractual agreement.

C. Conex and Twin Were Aware of the Rules Even Prior to 1968

Despite the foregoing evidence which established the origin of the Rules in 1959, the Board, contrary to the Administrative Law Judge, found that ILA abandoned its claim to the stuffing and stripping work in 1959.

Even the history and admissions of the Charging Parties are direct proof to the contrary (155a, 158a, 171a).

Conex was, *by its own admissions,* subjected to stuffing and stripping in 1966, the very first year of full-time operations (788a-789a). The stuffing and stripping took place at both Sea-Land and Seatrain, the only carriers in the Puerto Rican trade at that time, and it continued for at least three weeks (788a-790a). *This occurred two years before the Rules on Containers were codified in their present form in the 1968 agreement.* ILA longshore personnel, repeatedly sought to and did stuff and strip such containers (742a, 751a, 752a) (See also affidavits of F. Field and R. Connors, 114a, 121a).

The record further establishes that the deliberately evasive and misleading tactics of the shippers *effectively prevented* Respondent Union and the NYSA-ILA Container Committee's ("the Committee's") inspectors from enforcing (or: "policing") the Rules. Clear, unequivocal evidence of such practices by the carriers initially is contained in Mr. Jacobs' examination in Conex (822a) disclosing what can only be properly interpreted as payoffs. It further surfaces in the testimony of Messrs. Longo and Pinero, employee-drivers of a subsidiary of Twin. On a daily basis since late 1971, each of them observed two Sea-Land agents change seals (i.e., remove Twin's and replace with Sea-Land's) on the trailers (container vans) *without so much as moving or opening the trailers,* in the outdoor parking areas at Sea-Land's terminal* (1152a-1153a, 1158a-1159a).

---

* Sea-Land's proclivity for violating similar—if not identical—contractual provisions is a matter of record. (See 385a—a 1962 violation.)

The consistency of such nefarious practices among the disingenuous carriers is graphically demonstrated by summaries of TTT and Sea-Land shipping records (683a-695a), as interpreted in part by TTT Senior Vice-President Semack. He correctly concludes that a (representative) sampling of TTT containers *were not stripped* inasmuch as the seal numbers on trailers recorded on the Dock Receipts (in New York) and TIR's (in Puerto Rico) remained constant while the intermediary stripping tallies bore entirely different and irreconcilable notations (1139a-1140a). Similarly, a Sea-Land exhibit corroborates the testimony of the two drivers (see second, third and fourth columns, each page, of Exh. P(TW)-8, 683a-693a).

As the evidence shows, any tradition founded on ILA's and the Committee's agents' inability to enforce the Rules prior to February, 1973 can only be the outgrowth of illicit practices of the carriers, encouraged by the self-interested Charging Parties. As the Court perceptively remarked (in the Consolidated case):

> "It just isn't slipping through. There was no effort as I see it, *on the part of some of the companies*, at least, if there was a contractual obligation, *to live up to that contractual obligation*,"

to which NYSA's counsel then readily admitted in stating ". . . *there was substantial slipping through.*" (emphasis added) (1124a-1125a)

In any event, as the Administrative Law Judge found (172(a) at fn. 12), *the very fact* that such documents *showing rehandling* were kept in the regular course of business is *cogent evidence* of NYSA's members' *acknowledgment of ILA's jurisdiction* over the (re)handling of such containers.

The Court can readily discern from this record that the existence and persistence of bad faith, counter-contractual practices, such as those occurring at Sea-Land, were a prime motivating cause behind the lengthy, bitter disputes *between NYSA and ILA* (but never with Conex or Twin

or with any other consolidator). This controversy preceded—and ultimately resulted—in the lengthy articulation in the 1968 contract of the Rules on Containers and their implementation through the "Dublin Rules". Thus, ILA's President, Thomas W. Gleason, asserted—in words of frustration and justified anger—the impossibility of policing the violations. In a letter of May 11, 1972 to NYSA Chairman, James J. Dickman, Gleason charged:

> ". . . These violations [of the container provisions of the collective bargaining agreement] have grown to where there is a *complete abrogation and disregard of our contract* with respect to the loading and stripping provisions. As I have stated in the past, it would take the FBI, CIA and every other agency to investigate and stop these violations. *If the employers were acting in good faith, they themselves could stop the violations overnight.*" (267a) (emphasis added)

In turn, Dickman attempted to halt the illicit practices upon a real threat by the ILA to take contractually-permissible action to reopen the contract (266a).

At a meeting on November 20, 1972 between the leadership of the ILA and representatives of major container carriers in the Port of New York, the parties discussed methods of preventing or discovering violations at great length (276a). These included proposals for "bounties", "outside police agencies" and "increased liquidated damages". Gleason called upon the carriers "to support the ILA where the ILA position was clearly right" and not "listen to their traffic people who were coming up with various devices and gimmicks [sic] to circumvent the Rules" (278a).

At that point in the meeting, the carriers' representatives caucused behind closed doors for close to one and one-half hours. *They* returned with a 5 point proposal, including suggestions that the Union not supply labor to facilities operating in violation of the Rules; the issuing of uniform

interpretation of the Rules; more effective documentation to identify Rule 1 Containers and closing down non-complying facilities. When the ILA team pointed out that the only member-operated facilities to be closed down were minor and/or temporary, the carriers were further called upon not to dispatch containers to consolidators and not to give containers out for consolidation, but rather to have longshoremen do that work at dock side. Further discussion ensued, but it is evident (from the summary of the meeting) that it was a mutually worked-out agreement, understood by all present to be *a concerted effort to enforce the terms of their contract* in the context of flagrant violations of the Rules by members within the NYSA "family", to the unquestioned detriment of the *Union and of the GAI Fund.*

These disputes culminated in a meeting held in Dublin, Ireland, between representatives of ILA and representatives of CONASA* on behalf of its employer-association members, including NYSA, to once and for all effectively enforce the Rules on Containers. On January 29, 1973, ILA and CONASA formally entered into a supplemental agreement, herein referred to as "the Dublin Rules". They provided, *inter alia,* that no ILA longshore employer shall supply its containers to any facilities operated in violation of the Rules on Containers, including but not limited to consolidators or distributors. Further, no such employer shall operate a facility in violation of the Rules on Containers which specifically require that all containers be stuffed or stripped at a waterfront facility (pier or dock) where vessels normally dock.

Summary of Argument

1. The Board in assessing the validity of the Rules on Containers as a work preservation clause focused on the

---

* By 1971, the employer associations had formed "CONASA" for purposes of bargaining with ILA on seven master contract items, one of which was the rules herein (see second fn. at p. 3, *supra*).

work of *third party employers* (Conex and Twin), rather than upon the work of *the ILA bargaining unit,* which Rules seek to protect ILA longshoremen on the docks. (Point I(a)).

This is an about-face to the approach of the Supreme Court in *National Woodwork Manufacturers Ass'n* v. *NLRB,* 386 U.S. 612 (1967) (hereinafter *"National Woodwork"*) which clearly held that the focus of analysis in any work preservation case must be on the work of the bargaining unit which invokes the contractual provision. The NLRB has always concurred to date, *except in this instance.* The inescapable result is that every existing and future work preservation clause in the United States will be jeopardized; it is a reversal of all existing precedent. If this Order is permitted to stand, then the legal principle of "work preservation" no longer is tenable. (Point I(b))

2. The Board found that the ILA had abandoned its claim to load LCL or consolidated cargo in its 1959 labor agreement. Here the Board *compounds* its error. *On the one hand, it* predicated its erroneous conclusion on a limited, literal interpretation of the language of the 1959 agreement. It completely disregarded the 10-year (1959-1968) unequivocal and undeviating interpretation given to that labor contract by NYSA and ILA, the parties to the collective bargaining agreement, both verbally and in its practical application to labor relations in the Port. *On the other hand,* the Board ignored the doctrine of work recapture first enunciated by the Supreme Court in *National Woodwork* and later refined and reaffirmed in a long line of appellate decisions, including *American Boiler Manufacturers Ass'n* v. *NLRB,* 404 F.2d 547 (8th Cir., 1968), *cert. denied,* 398 U.S. 960 (1970) (hereinafter *"American Boiler"*) *affirming* 167 NLRB 602. The Board's requirement of "exclusivity" of work performance inherently is ludicrous, as it has been decisively rejected by all of the courts which have treated the issue of "work preservation". (Point II)

3. The Board took no account of its Law Judge's analysis of this Court's determination in *Intercontinental Container Transport Corp.* v. *New York Shipping Assn. and International Longshoremen's Ass'n*, 426 F.2d 884 (2nd Cir., 1970) (hereinafter "*ICTC*") and a consistent line of Board and Court decisions. Despite the clear holding in *ICTC* and the uncontradicted record evidence below, the Board erroneously found that the insertion of cargo into containers ("stuffing") or its removal therefrom ("stripping") is not incidental to loading and unloading ships and therefore within the periphery of longshore activities. But, *in fact,* the jurisdiction of ILA longshoremen always has extended beyond the ship and encompassed all of the interrelated functions on a waterfront terminal (*ICTC*, *supra* at 886). (Point III) The Board's reliance on two earlier longshore industry cases outside the Port of New York is patently misplaced, as they clearly do not evince work preservation activities. (Point IV)

4. Collective Bargaining, which is a continuous function of labor and management in facilitating compromises of their competing interests, will be seriously impaired if the Board's theory herein is approved. Work preservation clauses, like all other collective bargaining provisions, require re-evaluation to keep pace with changing work conditions and technological advances.

If the Board's decision is sustained, a labor union would certainly have to take a regressive position against *any* type of technological change. Otherwise, it runs the risk of being undermined by the Board at any time in the future. Under the Collective Bargaining process, the Rules evolved after many years of labor strife, strike, grievances and arbitration, and as part of an overall settlement of the competing interests of the shipping employers, who sought to use containers, and the ILA, who sought to proscribe their use. The very purpose of these Rules was to prevent encroachment on that portion of the traditional ILA

pierside work tasks of handling, preparing and loading and unloading local cargo for ocean shipment. (Point V)

Ergo, The Board's Order should be reversed, vacated and set aside. The Board's Cross-Application for enforcement should be denied. (Conclusion)

ARGUMENT

POINT I

The Board's basic statement of the issue herein is in error. The "precise work" *is not* the consolidation of LTL cargo at the consolidators' off-pier premises. Rather, it is the historical handling of cargo passing over the piers in connection with the longshore loading and unloading of containers, as found by the Administrative Law Judge.

(a) The work in dispute, which the Rules seek to protect, is not the off-pier consolidation ("stuffing" and "stripping") of the containers of Intervenors. Rather, it is the retention (on the piers) of that increasingly significant part of the traditional work performed by longshoremen in this Port since its very inception. ILA has sought to protect for its longshore members the physical handling of cargo in this Port in preparation of its shipment aboard vessels of the shipping company employers of ILA labor. ILA's members have had that work for more than half a century. The jurisdiction of the ILA traditionally encompassed all work performed at the pier in the movement of the cargo from the tailgate of the delivery truck to the hold of the vessel.

Prior to the use of containers, truckmen brought their cargo to the piers break-bulk (1144a-1145a, 1147a-1148a). (See affidavits of Gleason & Meyers, 85a, 90a). The jurisdiction of the trucker was limited to his truck. Once the cargo was removed from the truck, the trucker no longer had any duties or responsibilities with respect to the move-

ment of the cargo. With respect to import cargo, the trucker merely had authority to hire whatever personnel was required to assist him. Prior to 1953, it was the "public loader" who moved the cargo from the place of rest on the piers into the truck. These public loaders were members of the ILA. When the public loader position was abolished in 1953 their duties were assumed by ILA longshoremen, who were direct employees of the NYSA members, the stevedoring and steamship ecompanies. Thus, both before and after 1953, the longshoremen and members in related longshore crafts had all the duties and jurisdictions of handling the cargo once it was at the pier or terminal. The undisputed fact is that it has always been the longshoremen who have had full jurisdiction over the handling of the cargo on the piers. *That* is the "precise work" which the Rules seek to preserve.

When containers were introduced *the same procedure* as described above was continued and the longshoremen loaded the cargo into containers, *at the piers*. To prevent the discontinuance of this latter function and to prevent their work from being removed by their employers to the consolidator at his off-pier facility, the ILA in 1959 demanded and received contractual protection for its jurisdiction from NYSA. This contractual protection was later codified in 1968 into the Rules.

The "Rules on Containers" *do not* seek to take over the work performed by employees of consolidators or of their independent trucking contractors. This conclusion inevitably flows from the fact that there is no way in which consolidators can satisfy the ILA's objective. Even if they were to recognize and sign agreements with the ILA (which ILA has never sought) and were to become a signatory to the CONASA-ILA labor contract (which ILA has never sought), it still would not satisfy the objective of the ILA (see *ICTC, infra* at Point III). Its objective was, has been, and remains that the consolidated LTL container work be performed by ILA members *at a waterfront or pier facility.*

The work in dispute involves work that admittedly has always been part of the ILA's traditional work jurisdiction (163a-164a). Accordingly, neither the Rules, which seek to preserve that work for the longshoremen, nor their implementation, can violate the Act. On the other hand, Intervenors and all other consolidators are free to continue to perform their tasks of solicitation, pick-up and forwarding of small shipments from various shippers under a single bill of lading, including all paper work attendant thereto, and the delivery of such cargo to the piers and terminals.

The Court will notice that the "Dublin Rules" which interpret and implement the Rules on Containers, prohibit as well a "*carrier or direct employer*" (i.e., NYSA member) *from operating facilities away from the pier or dock* in violation of the Rules on Containers, *which specifically require* that all containers be stuffed and stripped at a waterfront facility (i.e., pier or dock) where vessels normally tie-up (20a). If, as the Board and Intervenors will contend, the consolidators are the primary employers herein (and Respondent ILA seeks their work and employment), then such a prohibition as above is patently superfluous, inconsistent and ill-conceived. But, *that very provision,* in the context of the entire paragraph wherein it lies, incidentally *tells the whole story, viz.,* the obvious objective *of stopping even the NYSA employers,* directly, from moving the stuffing and stripping work which they are performing, away from the piers/docks (waterfront facility) and thus beyond the veritable job situs of the longshore unit. *No other interpretation is tenable.* It is proof of ILA's contention that it has a work-preservation objective and none other.

(b) *National Woodwork* contains the law and its interpretations which must guide the Board unless and until reversed or revised by legislative authority. *Nowhere therein is "exclusivity" a criterion for preserving or recapturing unit work.*

The Court is certainly aware that every case involving a TRUE work-preservation issue has presented a confron-

tation between (at least) two "traditions" (or: concurrent histories) in each of the industries involved, as the Administrative Law Judge shows (166a). The Board did not require those Union Respondents to demonstrate that employees whom they represented actually performed work for a charging party or on its products.* Rather, in the final analysis, the Board was required to determine only whether that traditional work *performed by the certified longshore unit* herein at piers and terminals encompassed the type of work performed by Conex's and Twin's employees (which, *but for the carriers' actions,* would have been ordinarily performed at the piers) that ILA, on behalf of said unit employees (but *not* for its membership generally) sought to contractually preserve or recapture.

Moreover, in all such situations neither the Supreme Court *nor the Board* has retreated from their initial positions that clauses in collective bargaining agreements which have as their objective the preservation of unit work are valid and do not violate either § 8(b)(4)(B) of the Act, notwithstanding the co-incidence of "two traditions", since

> ". . . the touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees. . . ." (*National Woodwork Manufacturers Association,* 386 U.S. 612, 645). Accord: *Houston Insulation Contractors Association* v. *NLRB,* 386 U.S. 664 (1967).

In essence, the Board's General Counsel below and Intervenors here are saying that *National Woodwork* was wrongly decided; the Supreme Court should not have looked at the work tradition of the job-site carpenters, as it did, but rather it should have focused upon the work *of the door manufacturers'* employees. But this is *the*

---

* E.g., that the job-site carpenters in *National Woodwork* did work for the manufacturers of pre-fabricated doors.

very argument rejected by the Supreme Court when it held that the proper area of examination is the work of the party invoking the preservation clause.

Thus, in *National Woodwork,* the employer's carpenters refused to install pre-cut doors, unless the doors were cut on the jobsite by the carpenters themselves. Necessarily, the employees of the door manufacturers had *their own (uninterrupted) tradition over many years* of manufacturing doors, in addition to the concurrent tradition of the carpenters who cut the doors at the jobsite.*

Here, the Court is reviewing the same kind of situation that was present before the Supreme Court in *National Woodwork* and *in every other case where a work preservation objective has been found.* Unless another group of employees is doing or attempting to do the work customarily performed by the Unit, there would be no necessity for any work preservation provisions.

The Court surely recognizes that the unit description (see footnote p. 6, *supra*), talks generally in terms of *functions* and also *classifications.* The description generally refers to work ". . . *pertaining to* the . . . loading and unloading of cargoes . . ." and then recites various classifications of work. Surely, this unit description has not been and never was intended to encompass in precise detail *each and every function* on the waterfront. Nor does the inclusory language purport on its face or otherwise to encompass each and every classification and job task pertaining to rigging, coaling, loading, unloading, etc. The stuffing and stripping of containers *per se* was then, and has continued to be, a function encompassed within the skills and job tasks set forth in the unit description.

Put another way, it is precisely because non-unit employees elsewhere have increasingly engaged in performing

---

* It is significant to note that in *National Woodwork* (149 NLRB No. 65, 1964 CCH NLRB ¶ 13,555) the Board dismissed charges against the Carpenters' Union similar to those alleged herein.

the same or substantially similar work to that historically performed by the unit's members, and encroached upon the ILA unit's work, that the Union has been required to —and is legally entitled to—insist on a work preservation-type clause. *It is only when a unit's work is lost in significant quantity as to have an actual or potentially harmful impact on the unit employees' jobs and earnings that an alert union is prompted to assert its work preservation objectives.* Until that time, there is no real occasion for such assertion. As the consequences of unemployment related to containerization in the Puerto Rican trade in particular but also to other areas emanating out of the Port of New York, grew *by leaps and bounds* and cut even deeper into the livelihoods of men in—and very existence of—the longshore unit, the need to preserve *unit work became progressively more acute.* The bargaining history between ILA and NYSA (see *Facts, supra*), shows that it called for commensurately greater insistence by the union officials upon stronger measures to curb NYSA's members' deliberate erosion of unit work, by their permitting it to be performed elsewhere and thereafter failing to have the containers rehandled at the job-site.

As pertains to the *means* imposed by ILA on NYSA to compel its wayward members to adhere to the Rules, no one denies that the imposition (or, as here, actual agreement by NYSA at ILA's *insistence*) of liquidated damages had no salutary, remedial effects. At that point, their observations and reasoning realistically led the ILA's responsible officials to the difficult conclusion that the only means whereby the longshore unit could possibly exert its forediscussed rights to preserve unit work was—and is—to convince the NYSA to preclude its undisciplined members from utilizing their own containers (in order to evade the ILA's policing of the contract and practices), by making them available for misuse and abuse (See 276a-280a).

Only NYSA members can control where and by whom the loading and unloading of containers will be done, since

it is the NYSA members who own or lease the containers.* Though the admittedly unavoidable consequence was to deprive consolidators—as the Charging Parties here—of the use of the employers' containers, the Court *should not mistake the consequence for the objective.* The singular thrust of the so-called "Dublin Rules" was—and continues to be—the consistent ILA objective of making the employers (of unit employees) live up to their obligation to preserve unit stuffing and stripping of LTL containers. To this extent, the Rules and other valid work preservation clauses are no different in purport and intent than prohibitions against the subcontracting of unit work elsewhere in Board and Court reports where they were found to be valid and lawful provisions.

POINT II

ILA never abandoned, lost or surrendered its jurisdiction over the stuffing and stripping of consolidated containers. It has consistently endeavored to preserve that work for its longshore members by strikes, strife and the negotiation and enforcement of contractual container rules. In any event, it was entitled to reclaim or recapture such work.

In another context, this Court has noted that:

"[f]ew, if any . . . could have foreseen the change in the optimum size of shipping units that has arisen

---

* "The containers used by Consolidated and Twin for their operations are furnished to them by the steamship companies [Sea-Land, Seatrain and TTT] which do the actual transporting of the containers by sea. . . . Sea-Land, Seatrain and TTT all presently have pier facilities in the Port of New York where each employs longshoremen represented by ILA. Sea-Land, Seatrain and TTT are also employer-members of NYSA and, so far as their longshoremen are concerned, are covered by ILA-NYSA and ILA-CONASA agreements." (135a. See 728a-729a, 805a). The so-called "foreign trailers" also are leased by these carriers from outside sources but have no carrier markings, and have been let out by them to the consolidators.

as a result of the technological advances in the transportation industry." (*Standard Electric* v. *Hamburg S.D.G.*, 375 F.2d 943, 945 (2nd Cir., 1967), *cert. denied*, 389 U.S. 89 (1967)).

We respectfully submit that the ILA's rank and file perspective on containerization *in 1959* was *similarly limited* by the undeveloped state of automation at that early stage. Nonetheless, Judge Ordman aptly recognized (in reference to Section 8 of the 1959 Memorandum) that

> "[W]hatever the precise scope of the quoted clauses, it is clear that ILA was in 1958 and 1959 concerned about the inroads made into its workload by the then incipient and modest containerization effect and was taking steps to abate that threat." (146a)

The ILA increasingly (re)asserted its right to the pierside handling of its cargo in employers' containers, commensurate with the burgeoning of containerization to unforeseeable proportions (see pages 11-15 of the *Facts*, *supra*, and Judge Ordman's Opinion at 154a-159a, 169a-173a). Sea-Land's introduction of the fully-containerized vessel in 1967, the unusually rapid growth and costly development of huge container yards in Newark-Port Elizabeth, Highland Hook, Brooklyn and elsewhere throughout this and other ports, with their immense cranes, transtainers, straddle carriers and other specialized equipment, gave an overview in the late 1960's barely conceivable in the 1950's.

Under any evaluation by the Board or Intervenors, it should be apparent that there could not have been a conscious "abandonment" of the monumental extent of work involved. ILA's clairvoyance in the embryonic phases in 1958 on the impact of containers on jobs could not have envisioned the present results, viz., that *70%* of all cargo now passes in containers through the Port of New York.*

---

* See statistics cited at *Point V*, *infra* and affidavit of T. W. Gleason at 96a.

In a related case in the Port of Hampton Roads, Virginia, wherein the Board sought to enjoin the ILA's interdiction of "full-shipper load" containers in accordance with *these same* Rules on Containers, a District Court (as the Board herein), likewise had difficulty in finding that the ILA contractually pinned-down certain work under prescribed conditions in earlier agreements. Nevertheless, that Court, unlike the Board there and here, comprehended that a "period of adjustment" necessarily took place over the years until ILA (could) have validly re-asserted its right to the work in question under *National Woodwork*. The Court's analysis there is illuminating:

> "Previous to the 1968 effective date of the first contract containing the Rules, I.L.A. workmen stripped any containers that the stevedores indicated they should strip, including those holding 'full container loads,' fully loaded containers intended for a single consignee. The 1968 and 1971 contracts, however, preserved to I.L.A. labor only the work of stripping less than full containers and containers with goods intended for more than one consignee. They did not preserve the stripping, even if close to the dock, of full container loads. It was not until 1974 that the Rules were redrafted to preserve for I.L.A. labor the stripping of full shippers loads. * * *
>
> "There was, then, a lapse of eight years in which the longshoremen did not have the right, under the then effective contracts, to exclusively strip full shipment loads. *This lapse was, the Court is satisfied, bottomed on a lack of comprehension of what was, during much of this period, a new concept of cargo transportation. Appreciable container traffic wasn't introduced in this area until the early 70's.* * * *
>
> "The degree of misapprehension under which the parties operated is also demonstrated by the extent of what was lost under the 1968 and 1971 contracts. *A*

trucker picking up on the dock a fully loaded container consigned to a single consignee could have, under those contracts with non-I.L.A. labor, broken the seal and transferred, right on the dock, the contents of the containers to its truck. This, under any definition, would be *dock loading and unloading—work which was historically performed by longshoremen. The newness adjustment time needed by all the industries affected by the process, must be expected to create temporary maladjustments in the legal agreements of the affected parties.*

"The Court concludes that the contract provisions in issue were intended and operate solely to preserve historical work practices, and *that the eight year period during which the work in issue was not protected by contract does not serve to extinguish I.L.A.'s right to preserve by contract the right to strip full shipper loads within fifty miles of port in 1974. . . . Reacquisition and preservation of traditional work is the purpose of the respondent union's actions, and this is both appropriate and legal. National Woodwork Mfrs. Asso.* v. *N.L.R.B.*, 386 U.S. 680 (1967); see *American Boiler Mfrs. Asso.* v. *N.L.R.B.*, 404 F. 2d 547 (1968)." *Humphrey* v. *I.L.A., AFL-CIO*, 401 F. Supp. 1401, 1406 (E.D. Va., Norfolk Div., 1975, per *Merhige*, U.S.D.J.) (emphasis added)

As noted, the Court cited the 8th Circuit's Decision in *American Boiler*, which *affirmed a Board Decision* reported at 167 NLRB 602 (1967), as controlling authority upholding a work preservation clause which was used not only to preserve, *but also to reacquire*, lost unit work. There a "fabrication" clause was negotiated by the union with a multi-employer association after use of packaged boilers, with trim piping attached, assumed a dominant position among the members of the association, thereby eliminating substantial work of the members in the unit employed by the association employers. The clause required all fabrication work to be performed by unit members at the job site,

thereby recapturing work that had been lost as a result of the increasing use of the packaged boilers which required no assembly at the jobsite.*

In upholding the validity of a clause similar to the ones herein, the Court concluded (at p. 554):

> "To summarize, we hold that a collective bargaining agreement which seeks to preserve work currently *being performed by unit employees* and *to reacquire that portion lost* is not violative of § 8(e). It follows from the teachings of *National Woodwork* that employees *can enforce such an agreement through concerted activity which is directed at their employer.*" (emphasis added)

All that is necessary to draw the analogy to the instant case is to substitute the *"container"* for the *"boiler."* In *American Boiler,* the union said to the employers: "we will not install the boiler unless fixtures attached to the boiler are attached to the boiler *on the job site by the union pipefitters."* In the instant case, the ILA has told the employers that they will not "install" the container aboard the vessel unless that container has been stuffed *on the pier or terminal* (the traditional and only job sites of longshoremen) *by longshore labor.*

As in the instance of the pipefitters, it is apparent that the longshoremen have equal right to recapture unit work *historically performed* without regard to the hiatus incurred in performing the amount of work diverted by carriers to consolidators away from the pier in derogation of their contract. In the *Boilers* case, fully-equipped boilers were being installed as far back as 1940-1941, just as stuffing and stripping has been continuously performed at

---

* "Packaged boilers were introduced before 1941 and by 1963, 23 years later, when the fabrication clause was obtained, accounted for between 60% to 85% of all boiler installations. The advent of packaged boilers resulted in a decrease of work at the job site for union members" (404 F.2d at 549).

piers by longshore labor since the 1920's and at an increasing rate in the late '50's and in the '60's.*

Certainly, a parallel work tradition was, in the interim, established at the plants of the boiler manufacturers, analogous to that at Conex's and, later, at Twin's warehouse. It was not until 1963—*23 years later*—that the clause enabling the recapturing of the pipefitter's work at the job site was finally obtained. Assuming, *arguendo*, that there were no formal understandings of the parties respecting stuffing and stripping of LTL container loads in the 1959-1968 successive contractual periods, as found by the Board, then the Court's resolution of the *Boilers* situation unequivocally demonstrates that the absence of same is no barrier to later attempts to resume the former (or contemporaneous) bargaining-unit work, as a work preservation measure.**

In sum, Judge Ordman correctly followed the *American Boiler* principle, in stating:

> "*American Boiler* furnishes solid support for Respondents' position insofar as it effectively repudiates the proposition that exclusivity of performance is a prerequisite to a claim of work preservation or that work siphoned away, even in substantial amounts, cannot be reacquired or recaptured. *The Board has consistently rejected such claims.*" (182(a)) (emphasis added)

The Board's disregard of this principle, in itself, was reversible error.

---

* Indeed, witness Tattersall further refers back to the "pre-war days" of 1939 and 1940, when Pan Atlantic assembled valuable cargo in wooden containers (1146a).

** It is noted that the pipefitters were unsuccessful in getting a work preservation clause in 1961, but did attain one in 1963.

POINT III

Over the years, the Board and the Courts have interpreted and applied the principles in *National Woodwork* to similar sets of facts, and have found work preservation objectives. The Board's conclusions herein arbitrarily ignore this clear line of precedents. It injects novel criteria already rejected by the Courts.

A. Even before *National Woodwork* and *Houston Insulation*, and thereafter, the Courts of Appeals had considered various aspects of work preservation under the Act.

As early as 1964 the Court of Appeals for the District of Columbia held that:

> "If the jobs are *fairly claimable* by the unit, they may, without violating . . . Section 8(e) . . . be protected by [contract] . . . Activity and agreement *which directly protect fairly claimable jobs* are primary under the Act. *Incidental secondary effects of such activity and agreement do not render them illegal.*" *Meat Drivers Union* v. *NLRB*, 335 F.2d 709, 713 (D. C. Cir., 1964) (Emphasis added)

Addressing itself to the facts of that case, which bear a striking analogy to those here involved, the Court said:

> "During the period of the expiring agreement, however, there was a dramatic change in the manner in which the employers conducted their business . . .. Thus the union, under its new proposal, is attempting not only to retain jobs for local drivers, but to *recapture* some of the work lost by the movement of packing houses out of Chicago. Unquestionably, this work is *fairly claimable* by the local drivers, and their union's efforts in their behalf in that direction fall easily within the legitimate area of collective bargaining." (Ibid. at 714) (emphasis added).

Accord: *Local Union No. 636 (Plumbers)* v. *N.L.R.B.*, 430 F.2d 906 (D.C. Cir., 1970).

Sheet Metal Workers International Association, Local Union No. 223 v. *NLRB*, 498 F.2d 687 (D.C. Cir., 1974), is an even more recent decision by the same Circuit. Specifically at issue therein was a rather typical "union standards" clause. The Court, after a brief but incisive analysis of *National Woodwork* and another case earlier considered in that Circuit, aptly stated the *criteria for determination of Section 8(e) charges in a primary-secondary context*, as follows:

> "The analytical process dictated by *National Woodwork and Local 710* may be summarized as follows. Under the circumstances existing at the time the contractual provision preservation of *fairly claimable work for members of the bargaining unit*, a primary objective? Or was the goal to use the contracting employer as a pawn in the union's labor disputes with other employer? Resolution of this ultimate issue presupposes answers to two preliminary questions:
>
> 1. What is the relevant bargaining unit?
>
> 2. In connection with the operation or project of the contracting employer, which jobs are *fairly claimable* by the Union? Or, in *National Woodwork* terms, in which jobs does the union have a *valid work preservation interest?*"

The Board itself has consistently adhered to the approach of the District of Columbia Court. This is exemplified in its Decision in *Teamsters Local Union 282 I.B.T. (D. Fortunato, Inc.)*, 197 NLRB No. 124, 80 LRRM 1632 (1972). There, Local 282 obtained a clause which among other things required members of Local 282 to do all trucking to, from and on the job site. However, the Board found that the employees covered by the contract

> ". . . do not now perform, and have not previously performed for their employers, a substantial portion of

the work which Local 282 assertedly seeks to safeguard for them." (80 LRRM at 1637)

Inasmuch as the employees of the signatory employers had *never* done the work, there was no basis to claim it was a recapture of lost work. Rather, the Board found that the clause was an attempt to "benefit *all* Local 282 members within the geographic area of Respondent's jurisdiction" (*Ibid.*). On this basis, the Board found the clause illegal since "it cannot be found that the clause was addressed to the labor relations of the contracting employers *vis-a-vis* their own employees" (*Ibid.*). Here, as the ILA's objective *could only* be satisfied by the employer members of NYSA, the distinction is apparent.

In *Fortunato,* the Board recognized that:

> "It is well settled that Sections 8(e) and 8(b)(4)(B) of the Act were not intended to, and do not, outlaw contract provisions or conduct which seeks to preserve for employees in the bargaining unit work which they have traditionally performed. Similarly, these sections also do not proscribe agreement or *conduct aimed at recapturing or reclaiming for unit employees work which otherwise constitutes 'fairly claimable' work.* However, it is equally well established that agreements and conduct intended to protect, preserve, acquire or reclaim work for union members *generally (i.e., outside the immediate bargaining unit)* violate both Section 8(e) and 8(b)(4)(B) of the Act on the theory that they exceed the legitimate interests of the unit employees *vis-a-vis* their own employer and are therefore tactically calculated to satisfy union objectives elsewhere." (*Ibid.*) (emphasis added)

There can be no question that the "immediate bargaining unit" is the longshore unit found by the Board at 116 NLRB 1183, 1188. Inasmuch as unit employees as such have never worked at inland locations, and as it is evident from this record that ILA at all times sought to have the work in controversy performed exclusively at the piers, it fol-

lows that Union members "generally," (such as those members in the *ICTC* case) never could—nor were they ever intended to—benefit from the Rules on Containers.

In *Retail Clerks, Local 648 (Brentwood Markets, Inc.)*, 171 NLRB 1218, 68 LRRM 1219 (1968), this Board upheld the conduct of retail clerks which was substantially similar to the ILA conduct here. There, the Clerks, in 1955, had included a clause in their multi-employer contract which granted to its members all work connected with the handling in the store of merchandise except for certain specified exceptions.

In 1965, *ten years* after the clause first appeared, and after a variety of merchandise subject to the clause was permitted to be done *by drivers*, the clerks enforced the clause at certain stores in the bargaining unit so as to preclude the employees of rack jobbers from performing in-store tasks on the goods.

This Board found that the application of the clause was lawful work protection. *The contentions raised by the rack jobbers are precisely the contentions raised by the consolidators herein. Each was rejected by this Board.*

In identical fashion, an *exclusivity* requirement was also rejected by the Sixth Circuit in *Canada Dry Corp.* v. *NLRB*, 421 F.2d 907 (6th Cir., 1970), *affirming the Board, Retail Store Employees, Local 876*, 176 NLRB 424 (1969). The Court of Appeals noted that the work involved was the *customary type of job function performed by the clerks.* Although the salesmen had a concurrent work history with respect to the work it was irrelevant, since the work was within the clerks' traditional work jurisdiction. Once the latter is established, the former has no significance.

Thus, the Court stated:

> "Moreover, the record is devoid of any evidence of a secondary objective. There is no evidence that the union had any dispute with any of the bottlers or other suppliers; or that it was attempting to re-

> quire the employees of the outside vendors to join the clerks' union; or that the union would allow the suppliers to shelve their own products provided they were represented by a union approved by the clerks." (421 F.2d at 910)

Here, too, the record is devoid of a secondary objective. There is no evidence that the ILA had any dispute with consolidators or was seeking to represent their employees, or that the Rules would not be applicable if ILA members performed the work for consolidators. (see *ICTC infra*)

B. The ICTC decision.

We need not refer exclusively to decisions in other Circuits for relevant application of *National Woodwork* principles in similar circumstances. For these very Rules on Containers passed judicial scrutiny *by this Court* in 1970 in *ICTC, supra.*

Plaintiff there, as the Charging Parties here, was engaged in the business of consolidating containerized LTL cargo away from the piers, using employee-members of ILA to do the work ILA longshoremen traditionally have performed at the piers and terminals. That case involved a broader attack on the Rules under the anti-trust laws. This Court (per Judge Hays) reversed the District Court which had enjoined the enforcement of the Rules against *ICTC,* and upheld their lawfulness as valid work preservation provisions under the *National Woodwork* test. The rationale of that Decision is summarized in The Administrative Law Judge's Opinion, wherein he knowledgeably states:

> "Citing the *National Woodwork* decision of the Supreme Court, the Second Circuit ruled, *consistent with uniform Board authority,* that 'the preservation of jobs is within the area of proper union concern (426 F.2d at 887),' and held further that '[u]nion activity having as its object the preservation of jobs for union members is not violative of antitrust laws.'

(id., at 887-888) . . . The Court pointed out, in addition, that the case before it was not a situation where the containerization provisions of the collective-bargaining agreement were the kind of combination between union and employers condemned in *Allen Bradley Co.* v. *Local Union No. 3,* 325 U.S. 797 (1945). Rather, the Court held that this was a situation where ILA, *acting solely in its self-interest, forced reluctant employers to yield to its demand that ILA-represented employees retain the work specified in the Rules on Containers.* Accordingly, the Court's conclusion was that the challenged clauses were within the labor exemption to the antitrust laws. Id., at 888. At the very least, therefore, it would appear that, on facts quite like those in the instant proceedings, the Court of Appeals for the Second Circuit, applying such authorities as *National Woodwork* and *Jewel Tea,* concluded that the Rules on Containers in the 1968 agreement were the product of ILA's efforts for 'the preservation of work traditionally performed by longshoremen covered by the agreement.' Id., at 887." (180a-181a) (emphasis added)

Contrary to the Board's and the Intervenors' theory that it is necessary to determine who is, or was, doing the particular work claimed to be within the work preservation clause, Judge Hays properly focused on the traditional work of the longshoremen. That work is not divisible. (See also Concurring Opinion of Judge Anderson).

It must be emphasized that the Court of Appeals' rationale did not alone rest upon an anti-trust case or statute. That Court gave full consideration and weight to *National Woodwork,* and, *significantly,* of *Fibreboard,** cited therein. These two cases, *inter alia,* are at the

---

* *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964).

foundation of the instant cases; *the principles* involved are *the same* that guided the Board and Courts *in every work preservation case to date.*

C. Since every work preservation clause has an impact on third parties, implementation of the clause will necessarily relocate work to the unit employees.

The Supreme Court fully appreciated and sanctioned the necessary consequences of work preservation provisions upon third parties in *National Woodwork,* wherein it stated:

> ". . . *however severe the impact of primary activity on neutral employers,* it was not thereby transformed into activity with a secondary objective." (386 U.S. at 627) (Emphasis added).

Similarly, the 8th Circuit in *American Boiler, supra,* held that the fact that "economic injury . . . will flow from permitting the Union to reacquire the work" had no relevance to the legality of the clause (404 F.2d at 552), just as the District of Columbia Circuit found that these are "permissible ancillary effects." Local 742, *Carpenters* v. *NLRB,* 444 F.2d 895 (D.C. Cir., 1971). See *Local Union No. 636, United Ass'n of J & A of Plumbing, etc.* v. *NLRB,* 430 F.2d 906 (D.C. Cir., 1970).

Thus, in *National Woodwork,* the prefab doors had to be sent back and no future prefab doors could be made by the door manufacturer to be used on the project (386 U.S. 362); in *Houston Insulation,* the subcontractor could no longer engage in "the preparation, distribution or application of pipe and boiler coverings" (386 U.S. at 665), matters which obviously "affected" it and its employees who could no longer do that work. The Rules are primary activity outside the ambit of Sections 8(e) and 8(b)(4)(B) and cannot violate the Act, regardless of the impact on Conex, Twin and other consolidators.

D. Summary.

The decisional law thus clearly establishes that the type of work which may be preserved by the union is work that is "fairly claimable" by unit employees. It follows that the Board in these (Conex) cases has *deviated* from its own long line of authority, as affirmed by this and other Courts of Appeal, *for no discernible reason.* As will shortly be demonstrated, the "precedents" it relies upon are far wide of the mark and do not, by any rationale, justify such deviation. Barring justification, the Board must adopt the recommendations of its learned and experienced Administrative Law Judge, whose findings on the facts and law correctly reflect the record evidence and whose expostulation of the legal principles is consistent with the decisional law.

POINT IV

The cases underpinning the Board's erroneous approach and its conclusions patently are inapposite. They are distinguishable on their faces. The Administrative Law Judge's analyses remain undisturbed.

The facts and import of the *Naval Supply Center* case, 195 NLRB 273 (1972), cannot be more adequately recited than in the learned Administrative Law Judge's Opinion (173a-175a), which we respectfully commend to the Court's attention. As he accurately discerns, "there are marked and pivotal differences" in *Naval Supply's* facts from those herein. They show that, unlike herein:

1) The Naval base operated its own waterfront facility and employed civilian employees for longshore activities.*

---

* The Board found that:

"The Supply Center *ships from and receives at its own docks* Department of Defense break-bulk cargo by either commercial or government ships. Since 1964, the loading and unloading of such cargo *has been performed by the Navy's own employees* represented by the Machinists." (195 N.L.R.B. 273, 275) (emphasis added)

The civilian employees traditionally handled breakbulk as well as containers usually belonging to the Department of Defense and subordinate agencies and their personnel, *which passed over the Center's piers and not the ones serviced by the employers of employees in the longshore unit.* Accordingly, the Board reasonably could find—as it did—that the "precise work" which was the focus of that dispute had been performed only by employees *in another unit performing longshore work,* and not by the ILA unit therein.

2) ILA expressly and by threat of boycott, *sought replacement* of said civilians, represented by another Union at the Center, by ILA-represented employees not then employed *at said waterfront facility.*

After the Navy refused the ILA's demand to replace its employees (represented by the Machinists' Union), with ILA members, the ILA sought to achieve this secondary objective by directing its members at the commercial piers not to handle containers originating at, or destined for, the Naval Center.

3) The Navy *was beneficial owner* of the cargo, which falls within an exception to the stuffing and stripping requirements under the Rules (Rule 1(b) at 512a).

Conversely, in these cases, only ILA longshoremen load and unload ships (break-bulk and container cargo) at *all* civilian waterfront facilities in the Port of New York and the Agreements and actions taken to enforce it are to preserve the traditional work of that unit. The stuffing and stripping of containers *passing over the non-military piers in the Port of New York* is part and parcel of the unloading and loading of the containers aboard the vessels. It had always been part of the traditional work performed by longshoremen.

Moreover, consolidators *are not* and *cannot* (*qua* consolidators) be the beneficial or legal owners of the cargo involved. Finally, *ILA has never made any demands on Conex, or Twin, either written or oral, to perform the work*

that has been performed at their places of business; and ILA's demands herein readily can be met *without* Conex's or Twin's replacement of their respective employees.* *Ergo*, dissimilarity of that and the instant cases is readily apparent, as Judge Ordman astutely recognized.

Moreover, this Petitioner—who was intimately involved in that proceeding—is at a particular loss to find any basis for the Board's principle reliance on *Naval Supply*, in view of the Board's own lucid interpretation of the meaning and, application of that very case to the Congress, in its 37th Annual Report (FY 1972) which it explained as follows (at pp. 119-120):

> "[In Naval Supply], the union sought to force neutral shipping and stevedoring companies to cease doing business with the U. S. Naval Supply Center, thereby *bringing pressure to bear on the supply center to hire ILA members to displace its own employees* who handled break-bulk cargo and containers at the supply center. *Noting that ILA members had never handled either break-bulk or container cargo at supply center*, the Board concluded the union's conduct was not aimed at work preservation but at acquisition of work historically performed by employees in another

---

* In direct contrast, to the ILA's ostensible objective in *Naval Supply*, Judge Ordman found that:

> "As indicated earlier, nothing in the instant case suggests —indeed the contrary is shown—that ILA sought to replace with its own personnel the employees who did the work for Consolidated and Twin at their respective sites. In fact, as the Intercontinental case demonstrates, ILA in the New York area resisted the siphoning off of work from its longshoremen on the dock area even where the off-port enterprise doing the work employed ILA-represented personnel . . ."
>
> "Rather than seek to expand its jurisdiction or benefit other ILA members elsewhere, the ILA insisted upon the non-discriminatory application of the Rules on Containers to all consolidators, whether they employed ILA members or not (426 F.2d at 889) since the sole purpose of the Rules was to protect the traditional work jurisdiction, not of the ILA in general, but of its longshore members at the waterfront, the endangered bargaining unit." (175a).

> work unit. *That restrictive provisions in the ILA contract with the employer association, on which the unions relied, might in other circumstances have valid work preservation objectives,* did not mean that they could be used as a shield for work acquisition here, the Board stated. *The Board decided that the Navy was the primary employer because ILA demands could only be met if the Navy were to replace its own employees represented by the Machinists with ILA members.* Thus, pressure on neutral shipping and stevedoring companies was declared illegal secondary activity and the unions were ordered to cease the illegal conduct." (emphasis added)

The foregoing decisively proves that Judge Ordman's analysis—not the Board's—is accurate. It follows that the Board's use of *Naval Supply* herein is fundamentally and fatally wrong.

The ILA Local in *Naval Supply* was not seeking by its conduct to affect the labor relations of the signatories to its contract, namely: the commercial stevedoring members of the Hampton Roads Shipping Association. Had the union attained its objectives, those employers would continue to handle the cargo in the exact same way as they had done previously. Here, when the ILA achieved its objective in the present case, the labor relations of the NYSA members were affected, since their employees were required to stuff and strip containers which previously may have been permitted to go on board without any rehandling.

So much for Naval Supply!

As pertains to *California Cartage,* 208 NLRB 994 (1974), aff'd 515 F.2d 1018 (1975), once again we defer to Judge Ordman's consummate analysis of that case's (in)significance in the total perspective of the divergencies in longshore history on the West and East Coasts (176a-178a). As his "dissection" clearly demonstrates, the *differences* between *Cal. Cartage* and the instant cases *are obvious and critical:*

The history of the development of containerization and its impact upon the shipping and longshoring industry on the West Coast did not parallel that which took place on the East Coast. As the Board found, *the teamsters employed by members and non-members of the PMA at off-pier locations on the West Coast* were engaged in the stuffing and stripping of both LTL as well as shipper loads of containers almost from the inception of containerization in that area of the country. The Board further found that, unlike the situation herein, the steamship companies on the West Coast had utilized the services of California Cartage and similar independent companies *directly as subcontractors* for consolidation of containers. Moreover, *members of PMA themselves* operated container stations *outside of* the terminals, utilizing ILWU non-longshore employees as well as Teamster labor. Accordingly, when the ILWU attempted to require both PMA *and non-PMA members*, in effect, to *turn over all* of the consolidation work to longshore employees at the piers, that union very well may have been acquiring work, in equal or in substantial part *not* traditionally performed by longshore employees whom it represents.

The foregoing reasoning is further supported by the Board's conclusions that a *jurisdictional dispute* existed on the West Coast between the ILWU and the Teamsters, concerning the performance of consolidation work. That the Board (in 208 NLRB No. 129) awarded the work of stuffing and stripping containers at LACT to "employees of PMA-member companies who are longshoremen represented by the ILWU" *did not* reflect a determination by the Board that Longshoremen, rather than Teamsters, were entitled to do so *by virtue* of their historical precedence or "tradition." The Board *also* found that Teamster employees should be awarded *identical* work rights at California Cartage's off-pier locations in recognition of a parallel history of "unit" work.

Moreover, as the Law Judge found herein, the ILWU exerted pressure on members of PMA *who did not employ*

longshore labor with the view of having the containerization work that they contracted out to be done by longshore unit personnel. As noted heretofore, ILA has at all times been in confrontation with members of NYSA, who *themselves* (or through their dock-side agents) have *always utilized longshore unit labor.*

Most significant are the findings of the Board that the ILWU at a very early stage in the development of containerization on the West Coast "effectively bargained away in 1960" its "make-work rights" involved therein by entering into the Mechanization Agreement. The history of the ILA on the East Coast, as developed in both of these cases, leads to the inescapable conclusion that the ILA maintained a *continual state of alert* throughout the 1960's and 1970's to any possible encroachment upon its jurisdictional claims. All management attempts to make deals analogous to that on the West Coast were summarily rebuffed by the leadership of the ILA. The testimony and documentation in evidence clearly show that *at no time* was ILA prepared to forego its rights to "rehandle" LTL containers, howsoever and wheresoever it was able to detect them; and that ILA customarily and persistently exerted pressure directly upon NYSA and its members to have longshoremen perform the stuffing and stripping of such containers.* This distinction alone between those and these cases, in our estimation, is sufficient to have the Court disregard the Board's analogy to *Cal. Cartage.***

In the final analysis, the Board is misapplying its own case law. Whether it does so out of plain misunderstanding or misconception of the facts, or to suit a specific con-

---

* Ross, *"Waterfront Labor Response to Technological Change: A Tale of Two Unions,"* Labor Law Journal, July, 1970, pp. 397-419 at p. 418.

** Judge Merhige, who was a member of the District of Columbia appellate panel that unanimously affirmed the Board in *Cal. Cartage*, addressed and upheld the CONASA-ILA Container Rules in the decision of the District Court in Hampton Roads (see pp. 26-27, *supra*).

clusion does not excuse its blatant error in summarily bypassing its Administrative Law Judge's studied analysis and reasoning.

POINT V

The adverse impact of containerization is gravely compounded by the Board's decision. It reverses 15 years of industry progress. It discourages all Union accommodations of traditional work jurisdiction to the needs of modern methods and efficiency.

In its present form the NLRB's Decision will have devastating consequences for the longshore industry, not only in New York but in all ports on the North Atlantic, South Atlantic and Gulf Coasts which have been affected by the "container revolution." That revolution which started in the late 1950's radically changed the nature of the longshore industry and caused years of labor strife and the loss of thousands of ILA jobs. The Rules, were part of a general settlement with the ILA, which permitted the container revolution to proceed, provided ILA members received certain protection of existing work. If these Rules are held invalid, *the entire framework* of labor relations in the longshore industry will be radically and significantly altered.

The Rules preserve for the ILA that residuum of container-related work following the *quid pro quo* of container royalties for permitting manufacturers' loads to move unimpeded.* It meant that cargo, which traditionally was trucked to the piers to be loaded or unloaded for ocean transport could just as easily *continue* to be brought to the piers to be handled by ILA labor. This portion of the

---

* As noted above the Board materially erred when it stated that the royalties were a *quid pro quo* for passage of LTC and LCL Containers (See contract proposal at p. 10 of Facts, *supra*). It further misconstrued this record in insinuating that "foreign" trailers were not "leased" by ILA employers and given to consolidators; and that containers not obtained from ILA employers would automatically be subject to the Rules (198a-199a).

ILA's traditional work jurisdiction would thus be maintained and preserved.

The NLRB's Decision can be read as permitting complete freedom on the use of containers, not only in the Puerto Rican trade to which this litigation was limited, but also in all other trades. Its order jeopardizes thousands of ILA jobs associated with the physical handling of the cargo in the containers. In its wake, any trucker, consolidator, warehouse or other party can rent a platform, hire employees at wages and fringes substantially lower than the longshoremen's to siphon work away from the piers and further erode the economic viability of the Port.

In *Fibreboard,* the Supreme Court stated:

> "In this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because of the working men and women of the Nation, these problems have understandably engaged the solicitous attention of government, or responsible private business and particularly of organized labor." (379 U.S. at 225)

The Court, in *National Woodwork, supra,* reiterated its foregoing comment, and said:

> "* * * Congress, in enacting Section 8(e), had no thought of prohibiting agreements directed to work preservation . . . *We cannot lightly impute to Congress an intent in Section 8(e) to preclude labor-management agreements to ease these effects through collective bargaining on this most vital problem created by advanced technology.*" (386 U.S. 612, 640, 642) (emphasis added)

The uncontradicted testimony of both management and union witnesses establishes the incredible inroads made upon the traditional longshore work opportunities by the new technology—containerization. For if ever there was an area where automation and technological change has

pervasively affected the job security and employment stability of employees and of the fortunes of their employers, it is in the longshore industry.

Let us look at the cold figures. In the Port of New York alone, during the 15 years covered by the record, there has been a loss of approximately 20,000,000 man-hours of longshore work. *In 1958* when containers were of minor significance in the Port of New York, 12,000,000 long tons of general cargo were handled, mainly on a break-bulk basis, utilizing 42,835,226 ILA man-hours (annually). *By 1972,* although more cargo was moved (approximately 19,000,000 long tons), only 22,627,084 man-hours of ILA labor were required.* By contract year 1973/74, the increased port-wide productivity occasioned by containerization showed even larger gains: 23,000,000 long tons handled with only 24.6 million man-hours.

Further statistics derived from data collected by the Waterfront Commission of the Port of New York show that, despite the fact that the number of tons of cargo moving through the Port has progressively increased, in the interval from 1959 to the present time, the *number of employees* engaged in longshoring and related work *declined from 31,500 to less than 13,000.* The most recently available data for the contract year October 1, 1974-September 30, 1975 shows an *average daily hiring rate of less than 8,200 employees* and that *an additional* 3,000-plus employees appeared for work on the average day and were turned away for lack of available jobs. Thus, in that relatively short period of time there has been approximately *60% reduction in job opportunities* for unit members on the piers in the Port of New York.** (See Affidavit of T. W. Gleason, 95a-96a).

---

* In 1972 there were only 10 months of longshore work, as a consequence of a two-month strike.

** "Labor productivity is astonishingly increased by containerization. One major shipping company reported that each of its work gangs on a conventional ship produced an average of 15 tons per

(*footnote continued on following page*)

The consolidation and deconsolidation functions require a permanent labor force of approximately 1,700 longshoremen who engage in the physical loading and discharging of cargo into and out of ocean containers. These are not the only workers affected by the NLRB's Decision. There are an additional 1,300 ILA employees who perform terminal functions directly related to the consolidation and deconsolidation work. These other ILA employees are comprised of other ILA longshore crafts, including checkers, coopers (cargo repairmen), delivery and receiving clerks, carpenters, maintenance men, mechanics, etc. who are involved in the overall physical movement of cargo from the tailgate of the delivery trucks to the stowage on board ocean vessels. The NLRB's Decision, thus, will eliminate 3,000 additional unit jobs.

The G(uaranteed) A(nnual) I(ncome) Fund, as the other fringe benefit funds, including pension and welfare are financed primarily by the levying of assessments on carriers and other direct employers of ILA labor per each weight or measurement ton of cargo that passes over the piers in the Port of New York. Inasmuch as GAI costs are open-ended and directly related to the effective enforcement of the Rules on Containers, the assessment rates of necessity from time to time have been increased to meet the needs of the Funds. To date, the employers have been almost consistently behind in having funds on hand to meet their weekly and periodic GAI obligations. As a result, as of the time of the hearing and at the present time, the employers' actual liabilities for funds borrowed to meet GAI deadlines exceeds $25,000,000.

---

hour compared with 300 tons an hour worked by one gang at a container ship hatch. More generally, the industry considers that 'it would take 126 men 84 hours each, or a total of 10,584 man-hours, to discharge and load about 11,000 tons of cargo aboard a conventional ship. The same amount of cargo on a container vessel can be handled by 42 men working 13 hours each or a total of 546 man-hours. These savings, it should be noted, come about because of a reduction in man-hours—a fact of menacing importance when we turn to collective bargaining on this issue'." Ross, "*Waterfront Labor Response to Technological Change: A Tale of Two Unions,*" Labor Law Journal, July, 1970, pp. 397-419, at 400.

Currently, the cost of GAI in the Port of New York exceeds $40,000,000. If an additional 3,000 men were to receive full GAI it would add another $40,000,000 to the already burgeoning GAI cost. Past history has established that any increase in the tonnage assessment rate is shortly followed by a loss of cargo normally moving through New York increased GAI costs because of attendant reduction in man-hours of work and the necessity for further tonnage assessment increases.* If the Rules are held invalid, the Rules will be of little consequence in controlling spiralling GAI costs with dire economic consequences for the Port of New York.

It is realistically foreseeable that the precarious *status quo* of labor relations between the employers and their employees under such conditions will rapidly deteriorate. Conditions will retrogress to the difficult times of the 50's and early 60's attended by strikes and disputes, which left their indelible marks on the memories of every resident of the Metropolitan New York area, and we are certain, in the memories of the members of this Court. Considering, then, the financial plight of New York City (in particular) at this time, the impact of lost income *via* the Port, through the absence of cargo which will be diverted elsewhere, cannot be overemphasized.

The foregoing lamentable "State of the Industry in the Port of New York" is the cumulative effect of 15 years of bargaining history. The Board must not be allowed at this late stage, after all has been said and done, to ignore reality and by its simple, devastating fiat to nullify progress, to cast 3,000 longshoremen on the GAI rolls, and to wreck the understructure of the Port.

---

* For the third time within the last six motnhs, the assessment levied on cargo in the Port of New York to support the guaranteed income program and other fringe benefits for longshoremen were increased—this time to $8.28 per ton, effective January 1, 1976.

Disappointing cargo movement made it necessary to boost the assessment from $4 to $5 in July, and to $6.85 in mid-November. The levy had been based on an estimate that cargo would average 26 million tons annually for the three years of the NYSA-ILA contract, but the actual volume was 21,700,000 tons.

Conclusion

The theory of the Board's and the Intervening Parties, rejected by Judge Ordman, seeks to engraft on the *National Woodwork* doctrine a new, novel and unsupportable theory which would in effect overrule *National Woodwork* and all cases applying its principle.

The theory that the Rules on Containers may not be applied to a consolidator who has performed consolidation is the same as saying that:

(1) The job site carpenter may not apply his work preservation rules against any fabricator who has performed fabrication in the past (*contra, National Woodwork*);

(2) The truckdriver may not deliver cargo in the Chicago area which has been delivered by an over-the-road truckdriver in the past (*contra, Meat & Highway Drivers*);

(3) A boilermaker may not do boiler fabrication on the site where the fabricated boiler has been delivered to the site by one who has performed prefabrication in the past (*contra, American Boiler*);

(4) A sales clerk may not shelve goods which outside salesmen have shelved before (*contra, Canada Dry Corp.*);

(5) All job preservation rules may only be applied as to those employers of employees outside the bargaining unit who have never performed any of the work prior to the inception of the work preservation rule (*contra, Sheet Metal Workers, Local 223*).

Obviously and clearly, this is not now the law, and has never been the law, and Judge Ordman properly found it not to be the law in the instant case.

The single question to be asked is: "Do the Rules on Containers seek to protect such work jurisdiction?" If the

answer is yes—and no other response is possible on this record—all other inquiry ends. The Rules must be upheld or all relevant law is ignored. Enforcement should be denied to agencies that trip on their own feet. Reversal is in order.

Accordingly, we pray that the Court reverse, set aside, and vacate the Board's Order and deny the Board's Cross-Application for enforcement.

DATED: January 22, 1976

Respectfully submitted,

THOMAS W. GLEASON
Attorney for Petitioner
International Longshoremen's Association, AFL-CIO

THOMAS W. GLEASON
HERZL S. EISENSTADT
Of Counsel

ADDENDUM

Section 10(e) of the Labor Management Relations Act of 1947, as amended (29 U.S.C. § 160(e)).

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order

such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Section 10(f) of the Labor Management Relations Act of 1947, as amended (29 U.S.C. § 160(f)).

Review of final order of Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an

application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Section 8(b)(4) of the Labor Management Relations Act of 1947, as amended (29 U.S.C. § 158(b)(4)).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organiza-

tion as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect

of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

Section 8(e) of the Labor Management Relations Act of 1947, as amended (29 U.S.C. § 158(e)).

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

CERTIFICATE OF SERVICE

I hereby certify that a copy of Petitioner International Longshoremen's Association, AFL-CIO's Corrected Brief was served this 5th day of February, 1976, by First Class Mail upon the following:

Lorenz, Finn, Giardino & Lambos
Attn: C. P. Lambos, Esq.
25 Broadway
New York, NY 10004

Steptoe & Johnson
Martin D. Schneiderman, Esq.
1250 Connecticut Avenue, N. W.
Washington, D. C. 20036

Glassie, Pewett, Beebe & Shanks
Attn: Allan I. Mendelsohn, Esq.
1819 H Street, N. W.
Washington, DC 20006

J. Warren Mangan, Esq.
32-43 49th Street
Long Island City, NY 11103

Cohen, Weiss & Simon
Attn: Bruce H. Simon, Esq.
605 Third Avenue
New York, NY 10016

John Irving, Esq.
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, DC 20570

Schulman, Abarbanel & Schlesinger
Attn: Howard Schulman, Esq.
350 Fifth Avenue
New York, NY 10001

Elliott Moore, Esq.
Deputy Associate General Counsel
National Labor Relations Board
Attn: Robert Giannasi, Esq.
1717 Pennsylvania Avenue, N. W.
Washington, DC 20570

RAY TARONE
Notary Public, State of New York
No. 24-[illegible]
Qualified in Kings County
Commission Expires March 30, 1976

Linda Parato
LINDA PARATO

Sworn to before me this 5th day of February, 1976.

Ray Tarone